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January 29, 2002

<u>BY ELECTRONIC FILING AND REGULAR MAIL</u>

William Caton
Acting Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Comments of Grande Communications in CS Docket 95-184 and WT Docket 99-217.

Dear Acting Secretary Caton:

Grande Communications, by its attorneys, submits this notice of the attached *ex parte* written presentation in the above-captioned dockets, pursuant to section 1.1206(b)(1) of the Commission's Rules. The attached written presentation is being provided by regular mail to Sarah Whitesell, Eloise Gore, John Norton, Royce Sherlock, and Holly Berland of the Cable Services Bureau, by copy of this letter.

Pursuant to sections 1.1206(b)(1) and 1.49(f) of the Commissions rules, this *ex parte* notice is being electronically filed for inclusion in the public record for the above-referenced dockets. Please direct any questions concerning this filing to the undersigned.

Respectfully submitted,

Jean L. Kiddoo
L. Elise Dieterich
Counsel for Grande Communications

cc: Sarah Whitesell
Eloise Gore
John Norton
Royce Sherlock
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Comments of Grande Communications on
Cable Inside Wiring and MDU Access Issues

On December 5, 2001, William Morrow, Chief Executive Officer of Grande Communications, and Andrew Kever, Grande's General Counsel, met with staff of the Cable Services Bureau to present Grande's concerns regarding problems the company is encountering in its efforts to bring competitive cable television services to multi-dwelling units in its service area in the Austin-San Marcos-San Antonio corridor in the state of Texas. *See* Notice of Ex Parte Comments, dated December 6, 2001. At the request of staff, Grande submits the following additional detail regarding specific instances in which it has encountered the types of problems discussed.

I. Background

Grande Communications is a Texas-based communications company providing residential and business customers with bundled high speed Internet access, local and long distance telephone, and cable television services over a single network. Grande is building this new, high capacity, deep fiber optic broadband network (averaging 24 homes per node) from the ground up, using the latest technological advancements in broadband communications. To date, Grande has finalized franchise agreements in 27 Texas cities and communities. Grande began offering services to neighborhoods in Austin, San Marcos, and San Antonio, Texas, in February 2001, and plans to provide bundled services to other Grande markets as additional sections of the network are completed. The company is set to complete construction along the entire Central Texas I-35 corridor within five to seven years, and will eventually serve the Austin metro area, San Marcos, New Braunfels, San Antonio metro area and the Houston metro area, passing more than 1.6 million homes. Within Grande's service area, a significant proportion of its customers and potential customers reside in multi-dwelling units (MDUs).

II. Cable Inside Wiring

A. Problems

Grande's competitive pricing, attractive multi-service bundle, and deep fiber network have allowed Grande to achieve significant success in persuading MDU owners to contract with Grande to provide service to their tenants. In order to provide service, however, Grande must either: 1) access existing home run and home wiring within the MDU, or 2) post-wire the building – that is, install a new set of home run and home wires. It is at this point that, although Grande has succeeded in selling its product, its competitor often intervenes in an effort to prevent Grande from delivering the goods. Using its control over the home run wiring as leverage, the incumbent can both force post-wiring of an MDU property and demand access to remove its own wires. This "double whammy" acts as a powerful deterrent to MDU owners against inviting Grande into their buildings.

The FCC's rules governing the disposition of cable home run wiring stipulate that, where a multi-channel video programming distributor ("MVPD") owns the home run wiring in an MDU and does not have a legally enforceable right to remain on the premises against the wishes of the MDU owner, the MDU owner may give the MVPD a minimum of 90 days' written notice that its access to the entire building will be terminated. The MVPD then has 30 days within which to make an election to: 1) remove its wiring and restore the MDU; 2) sell the wiring to the MDU owner; or 3) abandon the wiring. MDU owners are most concerned with the removal option, which not only requires post-wiring of the building, but also involves the terminated cable provider's personnel coming onto the premises and breaking holes into the walls and ceilings to take out embedded wiring and connections. The MVPD removing its wires must then replace insulation and electrical wiring disturbed during removal of its wires, repair holes made in the building's drywall, spackle, sand, and paint or re-wallpaper, in order to restore the premises to their original condition. Under the best of circumstances, this is a disruptive and messy process that MDU owners are loath to allow. When the work is being performed by a MVPD with whom the MDU owner has just terminated a lucrative long-term contract, the MDU owner's concerns are, understandably, heightened.

Playing on MDU owners' concerns, Grande's competitor in the Austin-San Antonio market, Time Warner Cable ("TW"), has employed several tactics under the guise of the FCC's rules to frustrate Grande's efforts to deliver services to MDU customers. Specific examples of the problems Grande has encountered follow.

1. <u>Threatening to remove wire to gain leverage over MDU owner in negotiations for the sale of existing inside wiring.</u>

TW has threatened to exercise its right to undertake the disruptive process of removing its wires in order to deter MDU owners from negotiating with Grande, and if undeterred, the tactic affords TW significant leverage over MDU owners in negotiating over the sale of the wires. At the Wilshire Wood complex in San Antonio, for example, TW made a timely election under the FCC rule to remove its home run wiring. The MDU owner, in response, provided detailed instructions to TW about its requirements for the removal and restoration work, and reiterated its interest in purchasing the wires, rather than having them removed. TW agreed to negotiate for the sale of the wiring. Those negotiations, however, were less than satisfactory. TW stated it would only sell the wiring to the MDU owner, not to Grande, although it knew that Grande would be the one using the wires. Moreover, as a prerequisite to sale, TW demanded that the MDU owner sign a "maintenance agreement" whereby TW would receive an easement to enter the MDU property; the MDU owner would agree that the wires belonged to TW; no alternative provider would be allowed to use the wires; and the MDU owner would agree to waive the state's conflict of law principles. The MDU owner at Wilshire Wood refused these terms, and TW eventually retreated from its original position. The final agreement provided that TW would retain ownership of underground conduit and wires (including active electronics) leading to each MDU building on the property, but did transfer ownership of the home run and home wire to the MDU owner. Grande then provided the MDU owner with the necessary funds to purchase the wires and the MDU owner executed an amendment to the existing service agreement with Grande under which Grande took ownership of the wires for the term of the service agreement. Negotiation of this arrangement, however, took significant time and persistence on the MDU owner's part. The majority of MDU owners are unwilling or unable to expend their time and resources to negotiate with TW in order to assist Grande in obtaining use of the existing cable inside wiring for the provision of competitive services.

2. Failure to give notice of early termination of service.

At the Harvard Place MDU in Austin, Texas, the MDU owner asserted its right to terminate its existing month-to-month service agreement with TW. TW challenged the MDU owner's right to terminate the contract, stating in a letter that its records did not indicate any month-to-month agreement at Harvard Place. The TW letter, which was received within 30 days of the notice of termination, failed to make any election as to the disposition of home run wiring. Upon concluding that the wiring at Harvard Place was old (RG59) and could not support Grande's digital services, Grande made the business decision to post-wire the MDU property with the consent of the property owner. At month's end, TW terminated its service to the MDU without providing written notice of this early termination. The tenants at Harvard Place were left without cable service for 3 days pending Grande post-wiring efforts.

3. Failure to acknowledge notice of termination.

At Southwest Texas State University, Grande won the competitively bid contract to provide service on the campus. The University sent notice to TW, the incumbent provider, informing TW that Grande had been awarded the new contract. Several months later, on the week designated for transition of service from TW to Grande, however, TW moved to block the changeover, claiming that it had never received the notice of termination required under the FCC rules. (Although TW conceded receiving notice that Grande had been awarded the University's contract, TW took the position that a separate termination notice was required.) TW then asserted a right under its expired contract with the University to remove its active electronics from campus. Grande offered to purchase the electronics or, alternatively, to furnish new, unused electronics to TW in order to avoid the inconvenience to the University that would be occasioned by their removal, but TW refused to sell or accept new units in place of the older, used units. Thus, in order to transition service, Grande removed the electronics and returned them to TW.

4. Failure to produce a copy of a contract with the MDU until the service termination date.

In another instance, at an MDU called Malibu in Austin, TW responded in writing to the MDU owner's notice of termination, within 30 days, by challenging the right of Grande to serve the MDU property as proposed by the owner. TW claimed an existing contract prevented Grande from providing service, but TW did not provide a copy of said contract, which according to TW expired on January 8, 2002. The letter from TW accepted the MDU owner's notice as notice to terminate the existing contract, and indicated that TW would decide what to do with the home run wiring in the coming weeks. In addition, TW offered the home wiring for sale, but not the home run wiring. TW refused any offer to sell the home run wiring to either Grande or the MDU owner. On the switchover date, TW refused to grant Grande access to its lock boxes at Malibu and finally produced a copy of its contract with the MDU owner, which, by its terms would expire on January 8, 2002. At the request of the MDU owner, Grande delayed the start of service. The MDU owner did not receive a subsequent notice of election from TW regarding the disposition of home run wiring. Under FCC regulations, TW's failure to provide such notice of election resulted in the abandonment of the home run wiring at Malibu. Grande has assumed control of the wire effective January 8, 2002, pursuant to agreement with the MDU owner and FCC rules.

5. <u>Claiming ownership of wire where ownership is ambiguous.</u>

At the Woodhollow complex in San Antonio, the MDU owner elected to switch service for its tenants over to Grande, and requested TW to produce its contract with the MDU, if it claimed to have one. TW failed to produce a contract, but claimed that its records indicated the existence of a contract and on this basis, asserted ownership of the home run wiring. Grande does not believe this is adequate proof of ownership and will proceed to serve the MDU property following notice of termination.

B. <u>Proposed Remedy</u>

To eliminate the ability of TW and other incumbent MVPD's to manipulate or frustrate, in the ways described above, the ability of competitors to provide service in MDUs, Grande respectfully requests that the FCC consider amending its existing cable inside wiring rules. Virtually all of the problems Grande has recounted herein would be remedied simply by requiring the compulsory sale of inside wiring owned by MVPDs, upon fair and reasonable compensation to the incumbent, when the incumbent MVPD's right to serve a given MDU is terminated. The rules should require, further, that use of the wires be transferred on a timetable that allows the new MVPD to connect to the existing wires, without any interruption of service to the MDU tenants.

III. <u>Perpetual Contracts with MDU Owners</u>

A. <u>Problems</u>

Another significant impediment to the provision of competitive cable services in MDUs is the existence of "perpetual" agreements that MDU owners executed with incumbent MVPDs, before competitive choice came into existence. In most instances with which Grande is familiar in its service territory, it appears that TW, and its predecessor in interest (the previous incumbent cable operator), have negotiated perpetual non-exclusive easements, providing access for TW to the MDU property "for so long as Grantee, or its successors or assigns [TW], has a franchise to provide cable television in the City." The effect of such easements, which TW, or its predecessor, has recorded in the relevant counties, is that an MDU owner cannot terminate TW's right to be on its premises. This situation handicaps both the MDU owner and Grande for two reasons. First, because the MDU owner cannot terminate TW, there is no possibility for Grande to purchase or otherwise use the existing home run wiring. Thus, if the MDU owner elects to grant Grande access to the building, the only available option is to post-wire the building. Because of the disruption inherent in placing new wires in existing premises, MDU owners are reluctant to allow post-wiring, particularly where they must continue to do business with the incumbent MVPD in any event. Second, it is often not economically feasible for Grande to post-wire a building in which the incumbent has a perpetual right to provide service. Post-wiring is expensive, and typically is cost-prohibitive unless Grande will have the right to serve all of the customers in a building. Grande is able to compete with TW on a non-exclusive basis in a given MDU where both have access to the existing home run and home wiring. The cost of post-wiring makes that competition prohibitively expensive.

It is important to remember that, when TW, or its predecessor, took its easement and wired the MDU, it was guaranteed monopoly access to the tenants there. Where TW holds a perpetual easement, Grande can receive no such guarantee. Moreover, unlike the situation with single-family homes, where Grande wires to the home only once it has won the customer, wiring an MDU where the incumbent remains present is a purely speculative investment. In an MDU where the incumbent also is present, there is no assurance that Grande will win sufficient customers to ensure a return on investment, and Grande cannot undertake the financial risk that post-wiring a building entails. For this reason, Grande generally does not post-wire an MDU unless it will be allowed to provide ubiquitous service for a term of years, subject, of course, to renewed competition upon expiration of its contract with the MDU owner.

B. <u>Proposed remedy</u>

Grande submits that the FCC could address this barrier to entry quite simply, by providing by rule for one "fresh look" at perpetual easements and other perpetual agreements between incumbent MVPDs and MDU owners. Grande believes, based upon its own very positive experience in working with MDU owners, that owners would welcome the opportunity to re-examine existing perpetual agreements. Alternatively, the FCC could extend the solution proposed above, requiring the compulsory sale of MVPD-owned home run wiring to MDU owners, or competitive service providers, at fair and reasonable cost, not only where the incumbent's right of access is terminated, but also where the incumbent's right is perpetual. This would then allow MDU owners to provide shared access to the wiring for competing providers, without the need to post-wire the building.

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